IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 23/08/2002

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THE HONOURABLE MR.JUSTICE C.NAGAPPAN

COMPANY APPLICATION NO.661 OF 2002
IN
COMPANY PETITION NO.76 OF 1997

M/s.Spartek Emerging Opportunities
(Mauritius) Ltd.,
No.12, Remy Oilver Street,
Port Louis,
Mauritius. ... Applicant/Petitioner

-Vs-

M/s.Argus Cosmetics Limited,
No.14, Luz church Road,
Mylapore,
Chennai-600 004. ... Respondent/Respondent

!For Applicant .. Mr.R.Murari

^For Respondent .. Mr.Dulip Singh, Senior Counsel
for M/s.King & Patridge

:ORDER

In this application, the applicant has sought for revival and restoration of Company Petition No.76 of 1997 to file, as per the order, dated 23.11.2001.

2.The applicant filed Company Petition No.76 of 1997 for winding up of the respondent company by reason of its inability to pay their debts. According to the applicant, while the company petition was pending, a memo of compromise was entered into between the parties on 25.3.1998, in which, the respondent admitted their liability to the extent of Rs.1,70,70,080/- and agreed to pay the same in instalments. The respondent failed to make payment as per the compromise and the Division Bench directed admission of the company petition and publication of notice of the same on 28.3.2000. The respondent filed an affidavit of undertaking to pay the above said sum in instalments and it again defaulted. The petition was heard and order was reserved and at the time of pronouncement of the order, the respondent once again offered to effect payment of the amount in instalments and based on that, a further memo of compromise was entered into between the

applicant and the respondent on 23.11.2001, whereby it is provided that out of the total amount of Rs.1,70,70,080/-, a sum of Rs.1.06 crores had been paid and the balance amount would be paid in instalments and if the respondent committed default in the payment of even one of the instalment, it would be open to the applicant to revive the company petition and in such circumstances, the respondent would waive all defences and such default would be a clear admission of respondent's inability to pay its debts. Once again the respondent failed and neglected to effect payment in terms of memo of compromise. The respondent has no intention of carrying out the assurance. Therefore the present application is filed.

3.The respondent in its counter has stated that the application is misconceived, without sanction of law and is liable to be dismissed in limini. The winding up petition was dismissed based on memorandum of compromise on 23.11.2001. The application to revive the dismissed petition on the alleged ground of non adherence by the respondent cannot be sustained in law. The petition for winding up affects not only the company but the creditors, shareholders, employees and others and hence due process of law has to be complied with. The order, dated 23.11.2001, although provides for revival, it cannot be considered as restoration of the petition and the applicant should follow the procedure afresh. It is true that a memorandum of compromise was entered into between the parties on 23.11.2001. The respondent had already paid Rs.1.06 crores out of Rs.1.20 crores owed to the petitioner. The respondent has paid a sum of Rs.5,00,000/- in the month of November, 2001, a sum of Rs.4,00,000/- on 3.12.2001, a sum of Rs.2,50,000/on 15.2.2002, a sum of Rs.1,50,000/- on 5.3.2002 and a sum of Rs.1,00,000/- on 17.6.2002. Thus the respondent has liquidated the entire money owed to the petitioner by way of principal amount. The memorandum of compromise provides for payment of interest by the respondent. The petitioner has received Rs.1.20 crores from the respondent for subscription in its shares on the express stipulation of the Reserve Bank of India that no person of foreign origin and financial transaction with it need the prior approval of Reserve Bank of India. The payment of interest is barred by the Reserve Bank of India vide their letter, dated 16.2 .1996. The respondent has no knowledge of any subsequent authorisation by Reserve Bank of India to pay any sum by way of interest. The applicant had produced a letter purportedly written by Reserve Bank of India, Mumbai, permitting the applicant to receive interest due from the respondent company and according to it, the interest amounts were to be credited to an NRO Account opened by the applicant. The condition stipulated by Reserve Bank of India is not complied with. The respondent is willing to honour its commitment on interest, provided the applicant provides it with some legal means to effect the payments. The applicant is yet to open the NRO Account and till such time as the NRO Account is not opened, the respondent cannot legally carry out its obligations under the memo of compromise. The respondent has been prevented from carrying out its obligations and it has not neglected or failed in its obligation the applicant.

4.A reply was filed by the applicant, in which, it has stated that the memorandum of compromise was recorded in the order, dated 23.11.2 001 and consequently the company petition was dismissed, leaving it open to the applicant to revive the petition in the event of respondent failing to comply with one or more terms of memorandum of compromise. The order was passed in

the presence of and with the full concurrence of the respondent and it has also not been challenged and has become final. Having defaulted to pay the amounts as per the compromise, the respondent cannot oppose the revival of the company petition. The contention of the respondent that the procedure should be followed afresh is more reprehensible. The word 'revive' means to give life again and to bring again to life. Filing of a fresh petition will certainly not amount to revival of petition and therefore the contention of the respondent has to be rejected. The subscription amount is intended for subscribing to shares in the respondent company and the question of paying interest on the same did not arise at that point of time. It is only when the respondent fraudulently refused to allot shares to the applicant after having received the entire subscription money, the question of interest arose. In fact, the applicant made an application to Reserve Bank of India, in pursuance of which, the Reserve Bank of India, by their letter, dated 30.3.2002, have permitted the applicant to receive a sum of Rs.50,70,080/- and further interest as per the memorandum of compromise, subject to the condition that the interest so received would be credited to applicant's NRO Account. The applicant has opened an NRO Account and has also intimated the same to the respondent. Hence the contention of the respondent that they could not effect payment on account of non availability of NRO Account is not correct.

5.The point for determination is whether the company petition is to be revived as sought for by the applicant.

6.It is not in dispute that the respondent company entered into a Memorandum of Compromise with the applicant/petitioner on 23.11.2001 and this Court recorded it and held that the company petition for winding up cannot be continued and it could not be held that the company is unable to pay its debts and dismissed the company petition with a direction that it is open to the petitioner to revive the company petition in the event of the respondent failing to comply with one or more terms of the compromise memo. The above order, dated 23.11.2001, was not appealed against and has become final.

7.The applicant has come up with the present application on the ground that the respondent failed and neglected to effect payment in terms of memorandum of compromise and committed default in complying with the terms thereon and hence the company petition has to be revived.

8.Mr.Dulip Singh, learned senior counsel for the respondent, raised two contentions and the first one is that the memorandum of compromise is void on account of violation of Section 47(2) of Foreign Exchange Regulation Act, 1973 and it cannot be enforced. The contention of the respondent is that a sum of Rs.1.20 crore was paid to the respondent for subscription in its shares on the express stipulation of the Reserve Bank of India that no interest would be payable thereon and subsequently, the respondent in the memorandum of compromise accepted to pay interest on the subscription amount due to the delay in refunding the money but subject to the approval of Reserve Bank of India and there is no express prior approval of Reserve Bank of India. The respondent in its counter has not pleaded specifically that the memorandum of compromise is void and it was only argued. Mr.R.Murari, learned counsel for the applicant, contended that the subscription amount was intended for subscribing to shares in the respondent company and hence the question of paying interest did not arise at that point of time and it is only when the respondent fraudulently refused to allot

shares to the applicant, after having received the entire subscription money, the question of interest arose and the applicant made an application to the Reserve Bank of India, in pursuance of which, the Reserve Bank of India by their letter, dated 30.3.2002, have permitted the applicant to receive a sum of Rs.50,70,080/- and further interest as per the memorandum of compromise subject to the condition that the interest so received would be credited to the applicant's NRO Account. A xerox copy of the letter, dated 30.3.2002, of the Reserve Bank of India is also produced.

9.It is true that under Section 47(2) of the Foreign Exchange Regulation Act, 1973 every contract which is prohibited to be done by or under any of the provisions of the Act except with the permission of the Central Government or the Reserve Bank of India, shall not be done unless such permission is granted. Mr.R.Murari, the learned counsel for the applicant, contended that the Foreign Exchange Management Act,1999 came into force in December, 1999 repealing the Foreign Exchange Regulation Act, 1973. Under Section 3 of Foreign Exchange Management Act, no person except with the general or special permission of the Reserve Bank of India, shall make any payment or for the credit of any person resident outside India in any manner or receive any payment by order or on behalf of any person resident outside India in any manner. The memorandum of compromise was entered into on 23.11.2001 between the applicant and respondent and clause (2) is the relevant clause and it is extracted below.

" 2.The aforesaid sum of Rs.1,70,70,080 consists of Rs.1,20,00,000 by way of principal amount, being the share application money, paid by the Petitioner to the Respondent, for which the Respondent did not issue the shares in the Respondent Company. The Respondent has also undertaken to pay the balance sum of Rs.50,70,080, subject to the approval of the same by the Reserve Bank of India or subject to the petitioner providing any alternate mode of payment that is not violative of any legal requirement."

As per the above clause, the respondent had undertaken to pay the balance amount to the petitioner subject to the approval of the Reserve Bank of India and there is no element of suppression in it. There is nothing in Foreign Exchange Regulation Act or Foreign Exchange Management Act to prohibit Reserve Bank of India from granting permission at a later date and the law does not require permission of Reserve Bank of India before entering into a compromise. In fact, the Reserve Bank of India in their letter, dated 30.3.2002, addressed to the applicant, have granted permission to the applicant to receive a sum of Rs.50,70,080/- and any further interest from the respondent subject to the condition to credit the interest in NRO Account to be opened by the applicant. In such circumstances, the contention of the respondent that the memorandum of compromise, dated 23.11.2001, is void on account of violation of the provisions of Foreign Exchange Regulation Act or Foreign Exchange Management Act is devoid of merit and has to be rejected. The memorandum of compromise, dated 23.11.2001, is not against public policy and is not violative of the provisions of the law and is perfectly legal.

10.The second contention of Mr.Dulip Singh, learned Senior Counsel for the respondent, is that though the order, dated 23.11.2001, provides for revival of the company petition, it cannot be considered as restoration of the company petition and the applicant should follow the

procedure afresh. According to him, the proceedings under Section 433 of the Companies Act, 1956 are proceedings in rem and the company petition having been dismissed cannot be scurruptuously revived on account of likelihood of subsequent contracts having accrued after dismissal of the company petition. In short, his contention is that default in payment of instalments would not revive the original cause of action, though that conduct of debtor may amount to a fresh cause of action. Per contra, Mr.R.Murari, the learned counsel for the applicant, contended that the memorandum of compromise was recorded and the company petition was dismissed giving liberty to the petitioner to revive the company petition in the event of the respondent failing to comply with one or more of its terms and that order having been made final, the respondent cannot oppose the revival of the company petition. He further contended that absence of specific power of revival under Section 443 of the Companies Act will be of no consequence, since the inherent powers are not taken away or restricted by Section 4 43(1) of the Companies Act and the inherent powers are in addition to the powers that are conferred under Section 443 and the order of revival has been made by the Court to meet the ends of justice and he relied on the decision of a Division Bench of this Court in RAMAKRISHNA INDUSTRIES (P.) LTD. AND OTHERS VS. P.R.RAMAKRISHNAN AND OTHERS, reported in (1988) 64 Comp.Cas. 425. The Division Bench has followed the earlier Bench decision of this Court in RAMAKRISHNA INDUSTRIES (P.) LTD. VS. P.R.RAMAKRISHNAN, reported in (1983) II MLJ 227. In the above decisions, it was laid down that the inherent power of the Court is not taken away or in any way restricted by Section 443 (1) of the Companies Act.

11.Rule 9 of the Companies (Court) Rules, 1959 is similar to Section 151 of Civil Procedure Code and the Apex Court and our Court have dealt with the scope of the above provisions in the following decisions.
In THE NEWABGANJ SUGAR MILLS CO. LTD. AND OTHERS vs. THE UNION OF INDIA AND OTHERS - (AIR 1976 SC 1152), the Apex Court held as follows.
"Head Note-A. ..... Though there are limitations on the powers of the Court it cannot abandon its inherent powers. The inherent power has its roots in necessity and its breadth is co-extensive with the necessity. ...."
In MANOHAR LAL CHOPRA VS. RAI BAHADUR RAO RAJA SETH HIRALAL - (AIR 1962 SC 527), the Apex Court laid down as follows.

"Head Note-(a). .... Section 151 itself says that nothing in the Code shall be deemed to limit or otherwise affect the inherent power of the Court to make orders necessary for the ends of justice. In the face of such a clear statement, it is not possible to hold that the provisions of the Code control the inherent power by limiting it or otherwise affecting it. The inherent power has not been conferred upon the Court; it is a power inherent in the Court by virtue of its duty to do justice between the parties before it. Further, when the Code itself recognizes the existence of the inherent power of the Court, there is no question of implying any powers outside the limits of the Code. ...."
In SATISH CHURN LAW vs. GANGULY - (AIR 1962 SC 806), the Apex Court held as follows.
"8. .... Rule 9 of the Companies (Court) Rules preserves to the Court its inherent powers to give such directions or pass such orders as may

be necessary for the ends of justice or to prevent abuse of the process of Court, and a direction to vacate an order previously made, is in a proper case within the Court's inherent jurisdiction."

In KRISHNAN AND ANOTHER vs. KRISHNAMURTHI AND OTHERS - (AIR 1982 MADRAS 101), a Division Bench of this Court held as follows.

"5. ..... Where the Code is silent and where the exercise of power is not opposed to or prohibited by the provisions of the Code, there could be no doubt that the court could invoke its inherent jurisdiction if it is satisfied that it is necessary for the ends of justice or to prevent the abuse of the process of the court."

12.The provisions of Civil Procedure Code so far as applicable shall apply to all proceedings under the Companies Act and the Rules. The inherent powers can be exercised wherever the Code is silent in order to prevent abuse of process of court or to meet the ends of justice. It cannot be exercised only where there is express bar by any statute or where the power of the court has to be exercised in a particular manner as prescribed under any particular statute.

13.The order, dated 23.11.2001, is passed on the basis of the compromise memo entered into between the parties as provided under Order XXIII Rule 3 CPC and if so, the order becomes non appealable under Section 96(3) of CPC. If the respondent could not have filed an appeal against the consent order passed by this Court, he may not be entitled to oppose the application for revival which has been permitted by the order itself. In any event, the order recording the compromise is binding on both the parties and the respondent has avoided winding up of the company because of the compromise order and hence he cannot now object to its implementation.

14.The Apex Court has repeatedly expressed its displeasure at the conduct of a party who seeks to resile from the terms of a compromise voluntarily and knowingly entered into by him in the following decisions.

In SALKIA BUSINESSMEN'S ASSOCIATION AND OTHERS vs. HOWRAH MUNICIPAL CORPORATION AND OTHERS - (AIR 2001 SC 2790), the Apex Court held as follows.

"8..... The learned single Judge as well as the Division Bench of the High Court have not only over simplified the matter but seem to have gone on an errand, carried away by some need to balance hypothetical public interest, when the real and only question to be considered was as to whether the respondent-authorities are bound by the orders passed by the Court on the basis of the compromise memorandum, and whether the proposed move on their part did not constitute flagrant violation of the order of Court –- very much binding on both parties. The High Court failed to do justice to its own orders. If Courts are not to honour and implement their own orders, and encourage party litigants –- be they public authorities, to invent methods of their own to short circuit and give a go-bye to the obligations and liabilities incurred by them under orders of the Court -- the rule of law will certainly become a casualty in the process –- a costly consequence to be jealously averred by all and at any rate by the highest Courts in States in the Country. It does not, in our view, require any extraordinary exercise to hold that the memorandum and terms of the compromise in his case became part of the orders of the High Court itself when the earlier writ petition was finally disposed of on 13.2.1991 in the terms noticed supra notwithstanding that there was no verbatim reproduction of the same in the order. The orders

passed in this regard admits of no doubt or give any scope for controversy. While so, it is beyond ones comprehension as to how it could have been viewed as a matter of mere contract between parties and under that pretext absolve itself of the responsibility to enforce it, except by doing violence to the terms thereof in letter and spirit. As long as the earlier order dated 13.2.91 stood, it was not permissible to go behind the same to ascertain the substance of it or nature of compliance when the manner, mode and place of compliance had already been stipulated with meticulous care and detail in the order itself. The said decision was also not made to depend upon any contingencies beyond the control of parties in the earlier proceedings."

In SOM DUTT vs. GOVIND RAM - (AIR 2000 SC 1638), the Apex Court laid down as follows.

"4. .... It is not in dispute that the premises in question were in the occupation of Bishandas, the father of Govind Ram (respondent). By virtue of the compromise which was entered into in 1981 before the appellate Court, the son of the tenant who was already in possession was allowed to continue for a period of 10 years. Even if there be a creation of tenancy, the compromise between the parties including Govind Ram was that Govind Ram would vacate the premises on 31st December 1990. It is on that basis that the compromise was arrived at and the order passed by the appellate Court. Apart from anything else, Govind Ram is clearly estopped from filing any application objecting to the execution of the decree. On this ground alone, Govind Ram has to be non-suited."

In BAKSHIRAM AND OTHERS vs. BRIJ LAL - (1994 Supp (3) SCC 198), the Supreme Court has held as follows.

"Head Note: ..... Law has to promote justice. The courts of equity and justice cannot uphold such an unfair stand. The respondent cannot be permitted to reprobate to his advantage. The binding effect of the compromise decree could not be taken away as it was to operate after death of the donor. May be a person with a better right, for instance, the sister of the last male holder, could sue the appellants and claim the property being nearer but that could not dilute the effect of the compromise decree, even though in nature of a declaratory decree, nor it could clothe the alienee with any right to resist the claim of the remote reversioner for recovery of possession on the ground that the next reversioner being alive the suit was not maintainable. The recovery of possession by the appellants could even be for the benefit of all the reversioners including the next reversioner, but it certainly did not adversely affect the suit filed by them for recovery of possession against a third person. When the succession opened on the death of the donor, it would have been governed by the law in force. His sister being nearer than the appellants could claim by virtue of the decree that the right and interest of alienor devolved on her. But if she did not, it could not recoil against the appellants and in favour of a stranger."

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In the case of KUKI LEATHER PRIVTE LTD. AND OTHERS vs. T.N.K. GOVINDARAJU CHETTIAR AND CO. AND ANOTHER -((2002) 110 Comp.Cas.474), a Division Bench of this Court, to which I am a party, has laid down as follows.

"..... Having secured that benefit and having made a solemn promise before the Company Law Board which was reduced to writing by the Board

and the correctness of that record not having been disputed at any point of time by any of the parties, the appellant long after that order came to be made chose to pretend as if no order had been made and it was under no obligation to purchase the shares which it had undertaken to purchase. It must be re-emphasized here that that order was at no point of time questioned in any legal proceedings by the appellants. .....

The facts already set out clearly show that the appellants derived a great advantage by making the statements they did through their counsel before the Company Law Board and persuaded the respondents to agree to the proposal, and after the agreement came to be recorded, the Company Law Board did not and was not required to proceed further in the matter regarding investigation into the affairs of the company. The investigation which the respondents had sought into the affairs of the company was thus successfully avoided. It is now not open to the appellants to turn round and claim that their actions should not be regarded as binding on them and that the technicalities of the Code of Civil Procedure should be imported in order to defeat the justice of the case. Acceptance of the arguments now advanced for the appellants would clearly result in justice being defeated and fraud allowed to be perpetrated by parties and their counsel on the adjudicatory forum. It would also cause grave doubts on the credibility of the statements made by the lawyers before the adjudicatory forum, which statements are normally relied upon by such forums as statements which are meant to be acted upon, and when acted upon to result in orders which would bind counsel and the parties represented by such counsel."

15.The solemn agreement, dated 23.11.2001, which is not against public policy and is not violative of the provisions of the law, recorded by this Court binds the parties and it is not now open to the respondent to turn round and claim that the original cause of action cannot be revived. 16.The learned counsel for the applicant brings to the notice of this Court the decision of the Gujarat High Court in GUJARAT STATE FINANCIAL SERVICES LTD. vs. AMAR POLYSTER LTD. - ((1998) 5 Comp LJ 95 (Guj)), in which, it is held that the term in consent giving liberty to revive the proceeding will not give right to the creditor to ask the court to revive the proceeding. The above judgment will not apply to the facts of this case for the reason that the company petition therein was dismissed as withdrawn and that was governed by Order XXIII Rule 1 CPC; whereas in the present case, the order of the court is based on compromise which is governed by Order XXIII Rule 3 CPC. Moreover, the Gujarat High Court has not discussed the scope of inherent power of the Court either under the Companies Act or under the Civil Procedure Code in the above decision.

17.Admittedly, the respondent has committed default in complying with the terms of compromise and hence the applicant is entitled to seek for revival of the company petition.

18.In the result, the application is allowed.

Index: Yes 23-08-2002.
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